Supreme Court, U.S.
FILED
MAR 14 1991
OFFICE OF THE CLERK

(8)

No. 90-1217

In the Supreme Court of the United States

OCTOBER TERM, 1990

SHIRLEY M. KEARING, PETITIONER

v.

THE HONORABLE S. MARTIN TEEL, JR., ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

KENNETH W. STARR
Solicitor General
STUART R. GERSON
Assistant Attorney General
BARBARA L. HERWIG
JOHN P. SCHNITKER
Attorneys
Department of Justice
Washington, D.C. 20530
(202) 514-2217

BEST AVAILABLE COPY

15 pp

QUESTION PRESENTED

Whether the district court correctly dismissed petitioner's complaint for failing to state a claim against any of the individual federal respondents.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement	2
Argument	7
Conclusion	11

TABLE OF AUTHORITIES

Cases:

Bivens v. *Six Unknown Named Agents*, 403 U.S. 388 (1971)	5
Boykin v. *District of Columbia*, 689 F.2d 1092 (D.C. Cir. 1982)	10
Bradley v. *Fisher*, 80 U.S. (13 Wall.) 335 (1872)	7
Cleavinger v. *Saxner*, 474 U.S. 193 (1985)	8
Harlow v. *Fitzgerald*, 457 U.S. 800 (1982)	6
Hipp, Inc., In re, 895 F.2d 1503 (5th Cir. 1990)	7
Hobson v. *Wilson*, 737 F.2d 1 (D.C. Cir. 1984), cert. denied, 470 U.S. 1084 (1985)	11
Jett v. *Dallas Indep. School Dist.*, 109 S. Ct. 2702 (1989)	10
Lockhart v. *Hoenstine*, 411 F.2d 455 (3d Cir.), cert. denied, 396 U.S. 941 (1969)	9
Malley v. *Briggs*, 475 U.S. 335 (1986)	9
Martin v. *Malhoyt*, 830 F.2d 237 (D.C. Cir. 1987)	11
McQuade v. *United States*, 839 F.2d 640 (9th Cir. 1988)	9-10
Mullis v. *U.S. Bankruptcy Court*, 828 F.2d 1385 (9th Cir. 1987), cert. denied, 486 U.S. 1040 (1988)	8

Cases—Continued: Page

Omega Equip. Corp., In re, 51 Bankr. 569 (D.D.C. 1985) 8
Panko v. *Rodak*, 606 F.2d 168 (7th Cir. 1979), cert. denied, 444 U.S. 1081 (1980) 9
Sequoia Auto Brokers Ltd., In re, 827 F.2d 1281 (9th Cir. 1987) 7
Siegert v. *Gilley*, 895 F.2d 797 (D.C. Cir.), cert. granted, 111 S. Ct. 292 (1990) 6, 10
Stoval v. *Haynes*, 580 F. Supp. 97 (W.D. Okla. 1983) 9
Stump v. *Sparkman*, 435 U.S. 349 (1978) 6, 7, 8
Tarter v. *Hury*, 646 F.2d 1010 (5th Cir. 1981) ... 8
Tymiak v. *Omodt*, 676 F.2d 306 (8th Cir. 1982) 9
United Steelworkers v. *Bishop*, 598 F.2d 408 (5th Cir. 1979) 9
Walters, In re, 868 F.2d 665 (4th Cir. 1989) 7
Whiteacre v. *Davey*, 890 F.2d 1168 (D.C. Cir. 1989), cert. denied, 110 S. Ct. 3301 (1990) ... 6
Zweibon v. *Mitchell*, 720 F.2d 162 (D.C. Cir. 1983), cert. denied, 469 U.S. 880 (1984) 8

Statutes and rules:

28 U.S.C. 151 9
28 U.S.C. 566(a) 9
42 U.S.C. 1983 5
Bankr. R. 9020 8
Fed. R. Civ. P. 12(b)(6) 4

Miscellaneous:

9 *Collier on Bankruptcy* (L. King 15th ed. 1990) 8

In the Supreme Court of the United States

OCTOBER TERM, 1990

No. 90-1217

SHIRLEY M. KEARING, PETITIONER

v.

THE HONORABLE S. MARTIN TEEL, JR., ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The judgment order of the court of appeals (Pet. App. A4-A5) is unreported. The memorandum opinion of the district court (Pet. App. A6-A18) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on October 10, 1990. A petition for rehearing was denied on October 29, 1990. Pet. App. A1-A3. The petition for a writ of certiorari was filed on January 28, 1991 (a Monday). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner and her husband are debtors in a pending Chapter 11 proceeding before the United States Bankruptcy Court for the District of Columbia. See *In re Leon R. & Shirley M. Kearing*, No. 86-00913 (Bankr. D.C.). Respondent, the Honorable S. Martin Teel, Jr., is presiding over that case. After having difficulties working with the Kearings to complete the reorganization, the court-appointed Trustee in Bankruptcy, John W. Guinee, Jr., filed with the bankruptcy court a "Motion to Compel Cooperation by Debtors." Pet. App. A47. On April 25, 1988, the court granted that motion and specifically ordered that petitioner "immediately turn over to the Trustee" rental payments received from tenants occupying several apartments owned by the Kearings, and further ordered that petitioner give the Trustee "all bank statements, cancelled checks, deposit slips and withdrawal slips for the [Kearings'] account at American Security Bank, N.A." *Id.* at A49. The court also ordered petitioner and her husband to make their northwest Washington home available to the Trustee in order for him to show it to prospective purchasers, *id.* at A47-A48, and expressly directed the Kearings to "cooperate with the Trustee in every other effort which he undertakes in the fulfillment of his statutory duties," *id.* at A50.

The Kearings did not comply with the bankruptcy court's order. As a result, on June 30, 1988, the court issued an order directing petitioner and her husband "to show cause why they should not be punished for civil contempt." Pet. App. A45. After a hearing, the court adjudged petitioner in contempt on September 30.[1] The court found that peti-

[1] After an initial hearing in July 1988, the court found that petitioner's husband was not in contempt of its order. Pet. App. A33-A34. At that time, the court postponed hearing petitioner's case in order to give her newly appointed counsel adequate time to prepare. See *id.* at A34-A35 & n.3.

tioner "failed to pay over $7,800 in rentals from units [the Kearings owned]," that petitioner "has failed to furnish to the Trustee copies of all [relevant] bank [records]," and that petitioner "refuses to cooperate with the Trustee in any way to obtain offers to purchase the house at 4801 Van Ness Street, N.W., and has failed to permit access to the property for purposes of showing it to prospective purchasers." *Id.* at A37.

On the same day, the bankruptcy court issued an order directing

> [t]hat 10 days after service of this Order, [petitioner] shall surrender to the United States Marshal and, if she fails to do so, the United States Marshal or his Deputy shall, subject to paragraph 4 [*sic*: 5] of this Order, seize [petitioner].

Pet. App. A23. Paragraph 5 of the court's order provided that

> pursuant to Bankruptcy Rule 9020, this Order shall be effective 10 days after a copy of it is served and shall have the same force and effect as an order of contempt entered by the District Court unless, within the 10 day period, [petitioner] serves and files with the Clerk of the Bankruptcy Court, objections to this Court's findings of fact and conclusions of law * * *.

Id. at A25.

Approximately two weeks later, at 3:15 p.m. on October 14, three United States Deputy Marshals (respondents Neely, Kerr, and Link) arrested petitioner and took her into custody on the basis of the outstanding court order. Earlier that day, however, the bankruptcy court had granted petitioner's motion for an extension of time to file objections to the contempt findings. Pet. App. A20. Once the bankruptcy court learned of petitioner's arrest and detention, it issued an

immediate order for her release at 4:02 p.m., October 14. *Id.* at A19.[2]

2. In October 1989, petitioner filed this federal court action against the following individual federal respondents: Judge Teel, Martin L. Bloom (Clerk of the Bankruptcy Court), John Waites (United States Trustee), Dennis Early (an employee of the Office of the United States Trustee), Herbert M. Rutherford (United States Marshal), and Deputy Marshals Neely, Kerr, and Link. Petitioner also named the court-appointed Trustee, John W. Guinee, Jr., and his legal counsel, Peter Kolker, Renee Hill, and the firm of Zuckerman, Spaeder, Goldstein, Taylor & Kolker, as defendants. As amended, petitioner's complaint alleged that

> [o]n or about October 14, 1988, at 3:15 p.m., under "color of law" [respondents], through malfeasance, misfeasance and nonfeasance of duty, did cause a tortious act by violating [petitioner's] guaranteed fundamental protection of due process of law by consummating an illegal arrest and incarceration of [petitioner] in blatant and malicious use of process in direct violation of the Constitution of the United States of America.

Pet. App. C17-C18. As relief, petitioner sought a total of $34 million in damages. *Id.* at C18-C19.

3. In February 1990, the district court dismissed petitioner's complaint for "failure to state a claim upon which relief may be granted." Pet. App. A10; see Fed. R. Civ. P. 12(b)(6). At the outset, the court pointed out that "[t]he complaint does not explain how the various [respondents]

---

[2] On petitioner's appeal, the district court upheld the bankruptcy court's contempt finding. Pet. App. C31-C34. The district court later adjudicated petitioner and her husband in contempt for interfering with the Trustee's sale of their house. See *id.* at C20-C23.

were involved in the due process violation." Pet. App. A8.[3] Turning to the private respondents, the court concluded that "the amended complaint fails to state a claim under [42 U.S.C. 1983] because it alleges no action by any person under color of state law." *Id.* at A11. The court also concluded that the claims against the private respondents did not state a claim under *Bivens* v. *Six Unknown Named Agents*, 403 U.S. 388 (1971). Pet. App. A11.[4]

With respect to the federal respondents, the court held that the "amended complaint also fails to state a claim under *Bivens*." Pet. App. A11. First, the court determined that petitioner's allegations fell short of implicating respondents

---

[3] The court then surmised:

> Rutherford is presumably a defendant because he is the supervisor of Neely, Kerr and Link, who allegedly executed the arrest. Judge Teel presumably [is] a defendant because he issued the contempt order, and Bloom is presumably in the case as Judge Teel's subordinate. Guinee, the trustee in the Kearing bankruptcy, is presumably a defendant by virtue of the fact that he sought and obtained from Judge Teel an order compelling the Kearings to provide him information, and [petitioner's] refusal to comply led to Judge Teel's contempt order. Early of the U.S. Trustees Office is presumably a defendant on account of his appointment of Guinee as trustee, and Waites is presumably a defendant because he is Early's superior. Kolker, Hill and the Zuckerman, Spaeder firm are apparently in the case because they represented Guinee in the bankruptcy litigation.

Pet. App. A8-A9.

[4] The court pointed out that Guinee's actions as a trustee did not amount to "conduct under color of law and thus was not a due process violation." Pet. App. A11-A12. The court therefore determined that "Guinee cannot be held liable under *Bivens*, and Kolker, Hill and Zuckerman cannot be held vicariously liable by virtue of their representation of him in carrying out his trustee function." *Id.* at A12. Moreover, the court recognized that "[a] suit against a bankruptcy trustee for quasi-judicial actions * * * would be subject to dismissal on immunity grounds." *Id.* at A12 n.1.

Waites and Early (the United States Trustee and his associate). As the court explained:

> The bare facts that Early was involved in the appointment of Guinee and that Waites is Early's superior do not amount to a specific allegation of constitutional violation.

Id. at A13. Second, the court found that "[t]o the extent that Judge Teel can be held responsible for the arrest, he is entitled to absolute immunity." *Ibid.* The court stated that since "bankruptcy judges clearly have contempt power, * * * Judge Teel did not act in 'the clear absence of all jurisdiction.'" *Ibid.* (quoting *Stump* v. *Sparkman*, 435 U.S. 349. 356-357 (1978)). Third, the court determined that such "[j]udicial immunity[, which] extends to other government officials for action closely associated with the judicial process," Pet. App. A13, "clearly covers clerk Bloom, * * * as well as the four marshals, who, pursuant to statutory duty, * * * were executing the order issued by Judge Teel," *id.* at A14.

In the alternative, the court held that "even if [respondent] marshals were not entitled to absolute immunity, they would be entitled to qualified immunity under *Harlow* v. *Fitzgerald*, 457 U.S. 800 (1982), because a reasonable person in their situation would not have known that their conduct violated clearly established law." Pet. App. A14-A15. The court added that "[e]ven if it could be gleaned from [petitioner's] complaint that she was alleging that the marshal's conduct was undertaken pursuant to an unconstitutional motive, the case law makes clear that the action must be dismissed." *Id.* at A15 (citing *Whiteacre* v. *Davey*, 890 F.2d 1168, 1171 n.4 (D.C. Cir. 1989), cert. denied, 110 S. Ct. 3301 (1990); *Siegert* v. *Gilley*, 895 F.2d 797, 802 (D.C. Cir.), cert. granted, 111 S. Ct. 292 (1990) (argued Feb. 19, 1991)). The court stated that "[t]here is no evidence whatsoever that the marshals actually knew their conduct was

unlawful or acted for any reason other than because they did not know that Judge Teel had stayed his contempt order." Pet. App. A16.

4. The court of appeals affirmed the judgment dismissing the complaint. Pet. App. A4-A5. In a brief opinion, the court pointed out that although "[t]he issue of whether the bankruptcy court has civil contempt powers has not been decided by this circuit," *id.* at A5, that issue did not need to be reached in this case because petitioner "otherwise failed to state a claim against [respondents]," *ibid.*

ARGUMENT

1. Petitioner contends (Pet. i) that review of the judgment below is warranted because the courts of appeals are divided over whether a bankruptcy court has authority to enter dispositive judgments in civil contempt matters. Compare *In re Walters*, 868 F.2d 665, 669-670 (4th Cir. 1989) (court has civil contempt authority) with *In re Sequoia Auto Brokers Ltd., Inc.*, 827 F.2d 1281, 1283-1291 (9th Cir. 1987) (court does not have such authority); see also *In re Hipp, Inc.*, 895 F.2d 1503, 1509-1521 (5th Cir. 1990) (bankruptcy courts lack authority to punish for criminal contempt). Although such a conflict does in fact exist, the issue is not presented for resolution in this case because the federal respondents are in any event entitled to dismissal of the action against them.

With respect to Judge Teel, this Court has long held that a judge "will be subjected to liability only when he has acted in the 'clear absence of jurisdiction.'" *Stump* v. *Sparkman*, 435 U.S. 349, 356-357 (1978) (quoting *Bradley* v. *Fisher*, 80 U.S. (13 Wall.) 335, 351 (1872)). A mere claim that the judicial act "was in error, was done maliciously, or was in excess of [the judge's] authority" is insufficient. *Stump* v. *Sparkman*, 435 U.S. at 356. Under the current state of the

law, as one commentator has noted, "[i]t is * * * unclear whether and what [contempt] power exists" in the bankruptcy courts. 9 *Collier On Bankruptcy* ¶ 9020.03, at 9020-6 (L. King 15th ed. 1990). For that reason, petitioner's claim that Judge Teel acted in the "clear absence of jurisdiction" (Pet. 25) is wide of the mark. At best, petitioner can claim only that Judge Teel acted "in excess of his authority"; such a claim, however, does not overcome the judge's absolute immunity from suit. *E.g.*, *Stump* v. *Sparkman*, 435 U.S. at 356-357; *Mullis* v. *U.S. Bankruptcy Court*, 828 F.2d 1385, 1388-1389 (9th Cir. 1987), cert. denied, 486 U.S. 1040 (1988).[5]

With respect to Martin L. Bloom, the Clerk of the Bankruptcy Court, this Court has "extended absolute immunity to certain others who perform functions closely associated with the judicial process." *Cleavinger* v. *Saxner*, 474 U.S. 193, 200 (1985). For that reason, the lower courts have consistently held that "[c]ourt clerks have absolute quasi-judicial immunity from damages for civil rights violations when they perform tasks that are an integral part of the judicial process." *Mullis* v. *U.S. Bankruptcy Court*, 828 F.2d at 1390; see, *e.g.*, *Tarter* v. *Hury*, 646 F.2d 1010, 1013 (5th Cir.

---

[5] Petitioner suggests (Pet. 24-25) that Judge Teel violated clearly established law in light of *In re Omega Equip. Corp.*, 51 Bankr. 569 (D.D.C. 1985), which held that bankruptcy courts lacked contempt authority. That lone decision cannot bear the weight petitioner would have it carry. First, as the court of appeals recognized, "[t]he issue of whether the bankruptcy court has civil contempt powers has not been decided by this circuit." Pet. App. A5; see *Zweibon* v. *Mitchell*, 720 F.2d 162, 171-172 (D.C. Cir. 1983), cert. denied, 469 U.S. 880 (1984). Second, the *Omega* decision predated the 1987 amendments to Bankruptcy Rule 9020, which governs contempt proceedings before bankruptcy courts. See 9 *Collier On Bankruptcy* ¶ 9020.03, at 9020-3 to 9020-5, 9020-8 (L. King 15th ed. 1990). Here, Judge Teel followed that rule in holding petitioner in contempt. See Pet. App. A25.

1981); *Panko* v. *Rodak*, 606 F.2d 168, 171 (7th Cir. 1979), cert. denied, 444 U.S. 1081 (1980). Here, petitioner did not allege that Bloom took any specific action regarding her arrest and brief detention on the contempt charge. As the district court stated, "Bloom is presumably in the case as Judge Teel's subordinate." Pet. App. A9. Since Bloom's only conceivable connection with the case is the performance of his duty to issue a duly entered court order, he is entitled to immunity from any claim based on that conduct.

Similar reasons account for the dismissal of petitioner's claim against Herbert M. Rutherford, the United States Marshal, and Deputy Marshals Neely, Kerr, and Link. As one court has explained, "law enforcement officials serving or executing writs valid on their face at the direction of judges are cloaked with the absolute immunity of the judges because they are performing ministerial acts at the direction of the Court." *Stoval* v. *Haynes*, 580 F. Supp. 97, 99 (W.D. Okla. 1983); see *Tymiak* v. *Omodt*, 676 F.2d 306, 308 (8th Cir. 1982); *United Steelworkers* v. *Bishop*, 598 F.2d 408, 414 (5th Cir. 1979). Such an immunity avoids the "manifest unfairness of subjecting one to suit as a consequence of action taken at the direction of officials [over] whom the individual actor has no control or power." *Lockhart* v. *Hoenstine*, 411 F.2d 455, 460 (3d Cir.), cert. denied, 396 U.S. 941 (1969).[6] Here, the Marshals executed a facially valid order calling for petitioner's arrest. Indeed, they had a statutory obligation to execute the bankruptcy court's order. See 28 U.S.C. 566(a); 28 U.S.C. 151; see also *McQuade* v. *United States*, 839 F.2d 640, 643 (9th Cir.

---

[6] The situation of a law enforcement official carrying out a judicial directive is, of course, different from that of a law enforcement officer applying for a warrant, as in *Malley* v. *Briggs*, 475 U.S. 335, 339-345 (1986).

1988). In these circumstances, the Marshals' immunity requires dismissal of petitioner's *Bivens* claim.[7]

Since the federal respondents' absolute immunity defeats petitioner's *Bivens* claim, this case does not present the issue currently before the Court in *Siegert* v. *Gilley*, cert. granted, 111 S. Ct. 292 (1990) (argued Feb. 19, 1991), namely, whether in a *Bivens* action based on an official's alleged malice, the plaintiff must support his claim with more than conclusory allegations in order to proceed in the face of a qualified immunity defense. Indeed, as the district court indicated, see Pet. App. A15, it is doubtful whether petitioner's complaint even sought to allege that respondents acted in bad faith. Moreover, even if the complaint could be construed to make that allegation, the complaint nowhere spells out the clearly established constitutional right that turns on improper motive and that respondents allegedly violated. In these circumstances, there is no need for the Court to hold the petition pending the disposition of *Siegert*.

2. Although the remaining federal respondents, John Waites, United States Trustee, and Dennis Early, an employee of the Office of the United States Trustee, do not enjoy absolute immunity on the record presented, they too were entitled to dismissal of petitioner's lawsuit. As the district court pointed out, petitioner's complaint scarcely explains the basis for including Waites and Early as defendants in her broadside attack. The court volunteered that "Early * * * is presumably a defendant on account of his

---

[7] With respect to Marshal Rutherford, petitioner made no effort to suggest that he participated either in her arrest or brief detention. See Pet. App. A8-A9, C16-C18. She therefore presumably sought to proceed on a *respondeat superior* theory. That common law tort doctrine, however, is not available to plaintiffs in *Bivens* actions. See *Jett* v. *Dallas Indep. School Dist.*, 109 S. Ct. 2702, 2722 (1989); *Boykin* v. *District of Columbia*, 689 F.2d 1092, 1099 (D.C. Cir. 1982).

appointment of Guinee as trustee, and Waites is presumably a defendant because he is Early's superior." Pet. App. A9.[8] Under the Federal Rules of Civil Procedure, however, a plaintiff "must, at the very least, specify the 'clearly established' rights [she] allege[s] to have been violated with 'sufficient[] precis[ion] to put defendants on notice of the nature of the claim and enable them to prepare a response.'" *Martin* v. *Malhoyt*, 830 F.2d 237, 254 (D.C. Cir. 1987) (quoting *Hobson* v. *Wilson*, 737 F.2d 1, 29 (D.C. Cir. 1984), cert. denied, 470 U.S. 1084 (1985)). Petitioner's complaint against Early and Waites falls far short of this minimal pleading requirement. See Pet. App. C14-C19, C26-C29. Accordingly, the courts below correctly dismissed petitioner's *Bivens* action against those remaining respondents.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

KENNETH W. STARR
Solicitor General

STUART R. GERSON
Assistant Attorney General

BARBARA L. HERWIG
JOHN P. SCHNITKER
Attorneys

MARCH 1991

[8] To the extent petitioner sought to proceed against Waites based on the doctrine of *respondeat superior*, that attempt must fail. See note 7, *supra*.

U.S. GOVERNMENT PRINTING OFFICE: 1991—282-061/20433